

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 298 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
No
 2. To be referred to the Reporter or not? No :
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
No
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
No
 5. Whether it is to be circulated to the Civil Judge? No :

NATVERLAL KESHAVLAL

Versus

HEIRS OF JETHALAL MAGANLAL- KASHIBEN JETHALAL MAGANLAL

Appearance:

MR ARUN H MEHTA for Petitioner
MR PV NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 30/03/2000

ORAL JUDGEMENT

1. This is defendant's Appeal against the Judgment and Decree dated 31.12.1979 of City Civil Court, Ahmedabad, partly decreeing the Suit of the plaintiffs directing the defednant - appellant to hand over

possession of the disputed land by removing the cabin unauthorisedly installed by him and awarding Rs.425/- as damages from 28.10.1972 to the date of the Suit and further awarding mesne profits at the rate of rs.25/p.m. from the date of institution of the Suit till recovery of possession of the disputed land.

2. Learned Counsel for the appellant Shri A.H.Mehta and learned Counsel for the respondent Shri P.V.Nanavati have been heard and the Judgment under Appeal has been examined.

3. Brief facts are that the plaintiffs claimed to be owners of the disputed land. It was alleged by them that the defendant unauthorisedly installed wooden cabin measuring 5 x 5 ft. in order to run his betle shop and he also encroached upon the municipal foot-path in February, 1971. The defendant requested for time to remove the encroachment, but inspite of undertaking did not remove the encroachment. In the year 1972 he removed the cabin, but again unlawfully and forcibly installed the cabin on the suit land in the night of 2.6.1972. Criminal complaint was instituted by the plaintiffs in criminal Court on account of illegal trespass and the said criminal proceeding terminated on compromise and undertaking given by the defendant to remove the encroachment. On 28.10.1972 encroachment was removed by the defendant, but again after some time he installed the cabin over the Suit land by making illegal encroachment and trespass. Objections were raised by the plaintiff No.1. Some quarrel took place and ultimately again criminal complaint was filed in the competent Court. The matter was also referred to the caste Panchayat and despite advise of Panches and agreement of the defendant to remove the cabin nothing was done. Consequently this Suit was filed for removal of cabin and restoration of possession of the disputed land in favour of the plaintiff. Injunction was also prayed for by the plaintiff restraining the defendant from interfering with plaintiffs' possession over the disputed land after it is delievered to the plaintiffs.

4. The defendant took contradictory and shifting stand. Initially it was the case of the defendant that he was co-owner of the disputed land. In the alternative he pleaded that he was exclusive owner of the disputed land. Subsequentl he pleaded that by virtue of Sale Deed he became owner of the disputed land. He also took legal pleas of mis-joinder and non-joinder of parties and causes of actions. Likewise it was pleaded that the Suit is barred by limitation.

5. The trial Court found that the plaintiffs are the owners of the disputed land. It repelled the defence plea that the defendant is either exclusive owner or joint owner of the disputed land. On the other hand it found that the defendant No.1 had encroached upon the land in Suit by placing cabin for running his beetle shop in the year 1971. It also found that the Suit was not barred by limitation nor it suffers from the vice of multifariousness. The trial Court found that the plaintiffs were entitled to recover possession of the disputed land. The trial Court, however, found that there was no necessity to grant perpetual injunction and it left it open to the plaintiff to institute another Suit as and when after delivery of possession the defendant again attempted to interfere with their possession. According to the trial Court the plaintiffs were entitled to mesne profits from 28.10.1972 till institution of the Suit at the rate of Rs.50/- p.m. and this amount was quantified at Rs.425/-. Mesne profits from the date of the Suit till recovery of possession were assessed at Rs.25/p.m. In this way the Suit was partly decreed.

6. The trial Court has first tried to discuss the title of the plaintiffs over the land in Suit. The findings of the trial Court on Issue Nos.1,2,3 & 3/A are based upon the oral and documentary evidence on record. Detailed discussion of evidence on record is found in the judgment of the trial Court. The trial Court had discussed in what manner the property in Suit transferred hands and how it was dealt with in private partition amongst co-sharers. It also considered inconsistent case taken by the defendant when the notice was received by him from Deputy Town and Development officer for removal of cabin. In reply to the said notice his case was that he was tenant. Thus, this is 4th stand taken by the defendant. Cabins were removed on intervals, but the defendant again and again placed the cabin over the disputed land. The matter was taken to the Criminal court where also the compromise was filed and the defendant was acquitted in criminal case on his undertaking to remove the cabin. The matter was also referred to Caste Panchayat and the Undertaking and Agreement before the Caste Panchayat was also not effectively honoured by the defendant.

7. The trial Court also considered the report of the Commissioner to find out topography of the land in dispute.

8. Oral evidence of the parties was also considered by the trial Court. It found that the oral evidence of the plaintiff and their witness was more reliable than the oral evidence of the defendant and his witness. The trial Court was justified in giving reasons that the statement of the defendant and his witness was interested and unreliable. The trial Court found inconsistency in the evidence of the defendant and his witnesses. In face of this inconsistency the trial Court has committed no error in disbelieving the oral evidence of the plaintiff and placing reliance upon the oral evidence of the plaintiffs which found corroboration from the documentary evidence on record. The documentary evidence was discussed and considered in proper perspective. The trial Court also found that one of the witnesses examined by the defendant gave evasive answers to the questions in cross-examination. As such that witness was also not reliable witness.

9. On the face of the above evidence and discussion the trial Court was justified in concluding that there is no substance in the version of the defendant that he is in possession of the Suit land as one of the co-owners or as exclusive co-owner. It was also justified in considering partition deeds and Memorandum of Partition and coming to the conclusion that the plaintiffs are the owners of the property in dispute and not the defendant.

10. Since the plaintiffs succeeded in establishing their ownership over the disputed land and also since they succeeded in establishing that the defendant illegally encroached upon the disputed land they are entitled to decree for possession over the disputed land. In view of illegal occupation of the disputed land by the defendant the plaintiffs are entitled to mesne profits as well.

11. The trial Court awarded mesne profits from 28.10.1972 at the rate of Rs.50/- p.m. and at the rate of Rs.25/- p.m. from the date of the Suit till actual recovery of possession. However, no cross objection has been filed by the plaintiffs that the mesne profits awarded by the trial Court at the rate of Rs.25/- p.m. from the date of the Suit till recovery of possession is erroneous. As such this part of the Judgment and order of the trial Court also requires no interference.

12. For the reasons stated above the Judgment and decree passed by the trial Court do not suffer from any error of fact or law. The Appeal, in these circumstances, has no merit and is liable to be

dismissed.

The Appeal is accordingly dismissed. No order as to costs.

sd/-

Date : March 30, 2000 (D. C. Srivastava, J.)

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